Constitution of the state does not operate proprio vigore to change the jurisdiction of this court in matters merely pecuniary, and that, until the Legislature shall act upon the subject the minimum of jurisdiction of this court remains as fixed by section 3455 of the Code of 1877 [Va. Code 1904, p. 1837]."

We must assume that the convention which framed the present Constitution were cognizant of the interpretation placed by the courts on corresponding provisions of former constitutions with respect to the jurisdiction of this court, and, if it had been their purpose to change the course of judicial decision on the subject, it would have been manifested in unmistakable language.

If a constitutional provision succeeds another on the same subject, and the former plainly required legislative action to become effective, while the latter is ambiguous on that subject, the courts will hold that the latter requires legislative action also. Newport News *v.* Woodward, 104 Va. 58, 51 S. E. 193.

The reverse of this is true with regard to article 6, § 88, and the phraseology there employed accentuates the necessity for legislative action.

The conclusion of the whole matter "is that, in the exercise of the state's police power, the dominion of the Legislature over the subject of intoxicating liquors is absolute, and, when it so ordains, the judgments of the tribunals upon which it elects to confer jurisdiction in that matter are not amenable to review by any other court.

We are, therefore, of opinion that this writ of error was improvidently awarded, and must be dismissed.

Note.

In Michigan the finding and determination of the board of supervisors as to the sufficiency of the petition for a local option election, and as to the requisite number of electors having signed the same, is final and conclusive and not subject to review. Thomas *v.* Abbott, 105 Mich. 687, 63 N. W. 984; Covert *v.* Munson, 93 Mich. 603, 53 N. W. 733; Friesner *v.* Charlotte, 91 Mich. 504, 52 N. W. 18.

PUCKETT *v.* MULLINS.

Dec. 6, 1906.

[55 S. E. 676.]

1. **Witnesses—Transaction with Deceased Person—Competency.**—Plaintiff gave notice to take depositions, whereupon defendant, who was present with his counsel, was called to testify on plaintiff's behalf as an adverse party, and his deposition was accordingly taken. On a subsequent day plaintiff was introduced as a witness in his own behalf and pending his examination in chief defendant died.

After the case was revived, plaintiff's examination was resumed, and his deposition taken over the objection of the administrator. Held that, after the death of defendant, plaintiff was disqualified from testifying by Code 1904, § 3346, providing that, where one of the original parties to the transaction is incapable of testifying by reason of death, the other party shall be incompetent to testify.

2. Same.—Code 1904, § 3349, provides that, if an original party to a contract or transaction with whom it was personally and solely made or had or his agent has been examined as a witness orally or in writing at a time when he is competent to testify and he afterwards dies or becomes incapable of testifying, his testimony may be proved or read in evidence and the adverse party may testify as to the same matters. Held, that such section was applicable only where the deceased party had been examined in his own behalf, or, in case of an agent, in the behalf of his principal, and afterwards died.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 722-725.]

Appeal from Circuit Court, Tazewell County.

Suit by Thomas Puckett against Austin Mullins, administrator. From a decree in favor of defendant, plaintiff appeals. Affirmed.

W. H. Werth, for plaintiff.
Chapman & Gillespie, for defendant.

WHITTLE, J. This is a suit in equity, instituted by the appellant, Thomas Puckett, to enjoin the sale of property under a deed of trust executed by him to secure a bond for $1,290, payable to appellee's intestate, Austin Mullins.

The transactions between these parties embraced numerous items, mostly of small amount, and covered a period of more than 15 years. During that time there were four settlements between them, Puckett in each instance executing a deed of trust to secure the balance ascertained to be due. These sums did not represent distinct debts, but the amount of indebtedness secured by each successive deed was composed of unpaid balances due on the preceding settlement, together with accumulated interest and intervening debits. The deeds of trust were as follows: The first bearing date June 1, 1887, for $200; the second, June 11, 1892, for $590; the third, September 15, 1893, for $893.59; and the fourth and last deed, June 24, 1902, for $1,290.

The gravamen of the bill is that the plaintiff was an ignorant, unlearned man, and was under the influence of the defendant, in whom he reposed confidence; that Mullins, taking advantage of these conditions, over-reached the plaintiff in the settlements referred to, and failed to allow credit for payments to which

Puckett was entitled, and by fraudulent methods of casting accounts made the indebtnedness appear larger than it really was. The bill also charged that the balances were attained by compounding interest on previous settlements at the rate of 10 per centum per annum.

There was a demurrer to the bill, and a general denial of its allegations by answer; and for further defense the defendant tendered a plea (under section 2823, Va. Code 1904) by which he averred that the deed of trust of September 15, 1893, secured a bond executed by the plaintiff that day for the amount then due, payable one day after date "with interest from date," which, according to its legal import, only bore 6 per cent. interest (Ward's Adm'r *v.* Cornett, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 550); and that nore than 12 months having elapsed after this renewal before suit was brought, plaintiff's right to rely upon the charge of usury was barred by limitation.

The trial court overruled the demurrer, but, at the final hearing, dismissed the bill.

The appellant relied mainly upon his own testimony to impugn the integrity of the appellee's demand, and his competency as a witness, which was denied, therefore becomes an important question in the case. The matter of his competency arose in this way: The plaintiff gave notice to take depositions, whereupon the defendant, who was present with his counsel, was called to testify on behalf of Puckett, subject to the rules prescribed by statute for the examination of a party having an adverse interest, and his deposition was accordingly taken. At a subsequent day, Puckett was introduced as a witness in his own behalf, and, pending his examination in chief, the defendant died, and the taking of depositions was postponed until the case was revived. The examination of Puckett was thereafter resumed, and his deposition taken over the objection of the administrator.

Austin Mullins having been rendered incapable of testifying by reason of death at the second taking of the plaintiff's deposition, the disqualification of the latter is fixed by the terms of section 3346, Va. Code 1904. Such was the construction placed upon a similar statute in the case of Keran *v.* Trice's Ex'rs, 75 Va. 690, the court there holding that, although one of the parties had testified in his own behalf and afterwards died, the other party was, nevertheless, incompetent.

It is sought, however, to distinguish the present statute from that construed in Keran *v.* Trice's Ex'rs, but it would seem obvious that there is no substantial difference between the two enactments. The former statute provides that, where one of the original parties to the contract or other transaction "is dead," the other party shall be incompetent, while the corresponding language of the present statute is that where one of the original

parties to the contract or other transaction "is incapable of testifying by reason of death," the other party shall be incompetent to testify. There can be no difference in the legal effect of the phraseology of the two statutes.

Judge Burks, delivering the opinion of the court in Keran *v.* Trice's Ex'rs, and was also one of the revisors of the Code of 1887, in which the change in the laguage of section 3446 was first made. In his address before the Virginia State Bar Association, on the revision of the statute law of the state, he observes: "Let me premise, that the expositor of the Code should keep in mind the rule of construction, that, in a general revision of the statutes of a state, the change of phraseology in a former statute does not necessarily imply an intention to change the law; that is, its meaning. On the contrary, the established rule is that 'the old law was not intended to be altered, unless such intention plainly appears in the new Code.'" Citing Parramore *v.* Taylor, 11 Grat. 242; Wenonah *v.* Bragdon, 21 Grat. 695. See, also, Harrison *v.* Wissler, 98 Va. 597, 36 S. E. 982.

This is a much stronger case for excluding the testimony of Puckett than for the rejection of Keran's evidence in the case referred to, for, in the latter, Trice had been regularly introduced as a witness and fully examined in his own behalf, whereas in this case Mullins was called to testify for his adversary before any other witness had been examined for the plaintiff, and when it was impossible for him to anticipate and rebut the evidence of his adversary.

The value of the decision in Keran *v.* Trice's Ex'rs is also attempted to be impaired by the suggestion that it is not in accordance with the weight of authority elsewhere. However that may be, it is the deliverance of our own court, construing a local statute (and in our opinion correctly construing it), and we are not disposed to depart from the decision as a precedent, except to the extent to which it has been modified by section 3349, Va. Code 1904. It is clear that the foregoing section is pertinent only where an original party, with whom the contract or transaction was solely made or had, or his agent, has been examined in his own behalf, or, in case of the agent, in behalf of his principal, and afterwards dies, or becomes otherwise legally incapable of testifying, and those representing that side of the controversy prove the oral testimony or read the deposition in evidence. In such case, the adverse party may testify as to the same matters. But the statute manifestly has no application under the facts of this case.

We have carefully scrutinized the evidence, and, with the testimony of Thomas Puckett out of the case, there is no escape from the conclusion arrived at by the circuit court—that the plaintiff

has utterly failed to establish the essential allegations of his bill by that clear and satisfactory preponderance of evidence required in suits of this character.

There is notable resemblance between this case and that of Hamilton *v.* Stephenson (decided at the present term) 55 S. E. —, where the court, upon more cogent evidence, denied the prayer to reopen settlements of long standing and order an account.

Upon the whole case, we are of opinion that the decree of the circuit court of Tazewell county is plainly right, and ought to be affirmed.

Note.

The principal case is one of very great importance, dealing as it does with a question of evidence, on which there is considerable conflict in the various states. The tendency of the judicial as well as the legislative mind is to widen instead of restrict the rules for the admissibility of evidence. But that our court has not always so tended we refer to that deplorable ruling in Montgomery's case, in which the court seemed to hold the evidence of a witness since deceased, on the former trial of a criminal case, inadmissible.

We are not attempting in this note to impugn the ruling of the court in the principal case on its facts, for in that the decedent in the principal case was testifying in behalf of his adversary and not in his own behalf, distinguishes this case from those cited below, but we believe that the court had these decisions in mind when it adverted that the fact that the ruling in Keran *v.* Trice was not in accordance with the weight of authority elsewhere. Of course, any expression of opinion on this latter point would have been obiter in the case at bar.

In Corning *v.* Walker, 28 Hun, 435, the court, in passing upon a ruling which excluded the defendant from proving an agreement with a deceased person, say: "A party cannot, by examining his adversary as to a transaction with a deceased, claim that such evidence is given by his adversary in his own behalf, and that, therefore, he may contradict him. This is not the meaning of the Code."

In most jurisdictions it is held that if the deposition of a party is taken during the progress of a suit and he afterwards dies, and the cause is revived in the name of his personal representative, the opposite party is competent to testify to matters contained in the deposition. Mumm *v.* Owens, Fed. Cas. No. 9,919; Runnels *v.* Belden, 51 Tex. 50; Shuford *v.* Chinski (Tex. Civ. App.), 26 S. W. 141; Monroe *v.* Napier, 52 Ga. 385; Kelton *v.* Hill, 59 Me. 259; Hollis *v.* Calhoun, 54 Ga. 115; Bingham *v.* Lavender, 2 Lea (Tenn.) 48; Hatton *v.* Jones, 78 Ind. 466; Coble *v.* McClintock, 10 Ind. App. 562, 38 N. E. 74; Leahy *v.* Rayburn, 33 Mo. App. 55; Allen *v.* Chonteau, 102 Mo. 309, 14 S. W. 869; Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; Zane *v.* Fink, 18 W. Va. 695; Seabright *v.* Seabright, 28 W. Va. 415; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

And this is substantially the ruling of the court in Keran *v.* Trice, 75 Va. 690.

But in Ohio it is held that the competency of a deposition is to be determined by the rules applicable to the witness himself if present, and although he was competent as a witness when it was taken, yet being a party and the adverse party having since died, it is incompetent against the executor or administrator. Bettman *v.* Hunt,

12 W. L. Bull. 286, 9 O. Dec. Reprint 396, citing St. Clair *v.* Orr, 16 O. St. 220; Fagin *v.* Cooley, 17 O. 44.

Under the statute which provides that where the adverse party is the executor or administrator of a deceased person, when the facts to be proved transpired before the death of such deceased person, the other party is incompetent to testify, it is held, that the deposition of a plaintiff, taken during the pendency of the suit, is not admissible on the trial when the defendant has since deceased. In the administration of justice, the admissibility, or competency, of a deposition must depend on the state of facts existing when it is presented for examination. Neville *v.* Hambo, 1 Disn. 517, 12 O. Dec. Reprint 768, citing Fagin *v.* Cooley, 17 O. 44.

Where a party to an action, being a nonresident of the county wherein the action is pending, causes his deposition in the case to be taken and filed, and afterward, and before trial the opposite party dies, and his personal representative is substituted in his place, such deposition is inadmissible in evidence on the trial, to the same extent as the oral testimony of the surviving party would be, if offered on the trial. St. Clair *v.* Orr, 16 O. St. 220.

In some states it is held that when a party to a suit has testified by depositions, and dies, the opposite may testify in his own behalf on matters referred to in the depositions, even before the personal representatives have introduced the depositions of their testator upon the trial. Coughlin *v.* Haeussler, 50 Mo. 126; Leahay *v.* Rayburn, 33 Mo. App. 55; Stone *v.* Hunt, 114 Mo. 66; Soble *v.* McClintock, 10 Ind. App. 562, 38 N. E. 74.

But the contrary has been held in other states Levy *v.* Dwihgt, 12 Colo. 103, 20 Pac. 12; Ivey *v.* Bondies (Tex. Civ. App.), 44 S. W. 196; Page *v.* Whidden, 59 N. H. 507; Kelton *v.* Hill, 59 Me. 259; Monroe *v.* Napier, 52 Ga. 385.

FLETCHER *v.* COMMONWEALTH.

Jan. 17, 1907.

[56 S. E. 149.]

1. Intoxicating Liquors — Offenses — Indictments — Violations of Revenue Law—Negativing License.—An indictment alleging that accused in a designated magisterial district unlawfully sold and delivered intoxicating liquors to a person named charges a violation of the revenue law prohibiting the sale of liquors without a license, within Va. Code 1904, § 4106, conferring on the circuit courts jurisdiction in cases of violations of the revenue law, though the offense was committed in a local option district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 243, 244.]

2. Same—Designation of Purchaser of Intoxicating Liquors—Necessity.—An indictment charging an unlawful sale of intoxicating liquors need not name the person to whom the liquors were sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 238.]

3. Same.—An indictment alleging that accused in a designated